December 29, 2006

OFFICE OF THE HEARING EXAMINER
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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0300133**

J. J. CARSTEN
Code Enforcement Appeal

Location: 37242 – 42nd Avenue South

Appellant: **J. J. Carsten**
P.O. Box 632
Vashon, Washington 98070
Telephone: (206) 463-3303

King County: Department of Development and Environmental Services (DDES)
represented by **DenoBi Olegba**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
Telephone: (206) 205-1528
Facsimile: (206) 296-6604

SUMMARY OF DECISION/RECOMMENDATIONS:

Department's Preliminary Recommendation: Deny appeal
Department's Final Recommendation: Deny appeal with extended compliance schedule
Examiner's Decision: Sustain appeal in part; deny in part with extended compliance schedule

EXAMINER PROCEEDINGS:

Hearing opened: September 12, 2006
Hearing closed: September 12, 2006

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On May 19, 2006, the King County Department of Development and Environmental Services (DDES) issued a Notice and Order to J. J. Carsten that alleged code violations at property identified as 37242 – 42nd Avenue South. The property is zone R-4. The Notice and Order cited Ms. Carsten and the property with three violations of County code:

   a) Conversion of a single-family dwelling unit into a duplex without the required permits, inspections and approvals, citing violated code sections.
   b) Conversion of a detached storage structure into a dwelling unit, without the required permits, inspections and approvals, citing violated code sections.
   c) Conversion of detached garden shed into a dwelling unit, without the required permits, inspections and approvals, citing violated code sections.

   The violations were required by the Notice and Order to be corrected by returning all three separate structures to their original permitted uses (single-family dwelling, detached storage structure and detached garden shed, respectively) by July 21, 2006, or application for and obtainment of required permits, inspections and approvals for an accessory dwelling unit (which DDES opines under the zoning code density regulations may only be obtained for one of the structures) by June 21, 2006.

2. Ms. Carsten, who purchased the property in March of 2003, filed a timely appeal of the Notice and Order. The appeal makes no claim and no defense to charges 2 and 3 regarding the detached storage structure and detached garden shed. (See Finding below regarding claims made in the hearing regarding such structures, which cannot be considered as a defense against the Notice and Order charges given their untimely presentation; in order to be viable appeal claims, they would have to have been timely raised in a timely filed appeal document.) The appeal states with respect to violation charge 1 of the conversion of a single-family dwelling unit into a duplex that that structure (which is the main residential structure on the property and was the subject of an approved building permit in 1974 which was "finaled"[1] on December 16, 1975), is not being used as a duplex but is being occupied by one family.

3. Regarding Notice and Order violation charges 2 and 3, for which as noted no appeal claim was made in a timely fashion and thus no viable defense is raised, the Examiner notes regardless that:

   A. DDES has made a *prima facie* case that no building permits were issued and no inspections and approvals made for residential use of the detached storage structure and detached garden shed. No refutation of the lack of building permits for habitable use has been presented into the record. Site plans prepared at apparently various times for structural development onsite variously described the garden shed as an "existing cabin" and "proposed garden shed"; and the detached storage structure, which is the structure onsite closest to the Trout Lake shoreline of the property on its south side, as an "aviary proposed," "workshop proposed," and "storage shed proposed." The structural plans for the latter building, the detached storage shed cited in violation charge 2, describe it as a "building unheated," and also are annotated with a handwritten notation, presumably by County building officials, "This is a 'storage shed' only and is <u>not</u> to be used for human habitation." (Emphasis in original)

[1] Granted final inspection approval for occupancy.

B. A building permit was granted by the County for the "storage shed" in 1987 and granted final inspection approval on July 23, 1987. The permit contains a specific handwritten annotation requiring that the storage shed be set back a minimum of 50 feet from the Trout Lake shoreline.

C. A realtor's advertising flyer for offered sale of the property describes it as containing a "main house," a "bungalow" including a kitchen, and a "separate efficiency (presumably apartment or unit)" also including a kitchen.

D. The Appellant asserts that she is an innocent purchaser of the property, and inherited the detached structures' inhabited status. The Examiner finds that that is the case.

E. The Appellant also claims that the County is in part responsible for the violations asserted in the Notice and Order, having been aware of the habitable status of the outbuildings onsite for a long time. The Examiner renders no facts regarding such claim, which is a claim of inequity, a common law claim that the County in essence should be *estopped* (barred) from enforcing the code under basic fairness. Not only is such claim not one which was timely raised in the appeal, and therefore cannot be considered due to its untimeliness, it cannot be considered by the Examiner in any case. The Examiner as a quasi-judicial hearing officer is generally limited to adjudicating matters under "black letter" law, *i.e*., law enacted in statutory or ordinance form. Washington case law limits the Examiner's exercise of common law in deciding cases. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984)] Any *estoppel* or other equity claim would have to be brought in a court of law (a court of general jurisdiction, *i.e*., Superior Court).

F. Depictions and descriptions in site plans and realtor flyers of the habitable nature of the subject outbuildings are no proof of their legality as habitable dwelling units. The fundamental requirement for legal habitable structural space is the obtainment of the proper permits, inspections and approvals by the regulatory agency, DDES.

G. No nonconforming use defense has been raised in the appeal claims.

4. DDES desires to take a relatively relaxed approach to enforcement of violations charges 2 and 3 regarding the habitation of the outbuildings in order to allow their occupancy until the expiration of a June, 2007, lease, to alleviate any hardship caused by forcing the breaking of the lease. DDES testified that there has been no septic system failure of allegedly illegal septic system expansions serving the two inhabited outbuildings, there are no hazards presented by their temporary continuance of occupancy, and no problems in general with temporary continuance (an assertion which is seconded by neighboring residents who submitted a letter stating that they have experienced no residential compatibility problems by the occupants of the outbuildings).

5. DDES is also of two minds regarding enforcement of the use of the main structure onsite, stating that it was "not concentrating" on enforcement of the main residential structure's allegedly violating use. DDES, however, also refutes the Appellant's contention that she is a resident of the structure by providing evidence that she uses a Vashon Island post office box as her mailing address. Although that assertion raises suspicion regarding Ms. Carsten's actual residency (she claims that she spends a great deal of time on Vashon Island although her official residence is onsite), such suspicion does not rise to the level of certainty of her actual residency status. In any case, the whole thrust of the owner occupancy issue relates to whether a legitimate accessory

dwelling unit is in existence onsite. Since there were no appeal claims timely filed regarding the outbuildings, the argument is moot with respect to the respective charges, and since DDES not desirous of pursuing enforcement of the required single-family residential occupancy of the main building at present, the issue is left to another day.

6. In summary, violation charges 2 and 3 of the Notice and Order were not timely contested by the raising of any claim in defense in an appeal document, and the only defenses were raised after the appeal deadline had passed and presented at hearing. In addition, DDES has made a sufficient *prima facie* case showing by a preponderance of the evidence that the two subject outbuildings are inhabited with human occupancy without the required permits, inspections and approvals as charged. Only the main residential structure and one detached storage shed have gained final inspection approval under legitimate building permits, with the detached storage structure only permitted as non-habitable space, which was specifically articulated on the plans, and in any case was specified on the building permit application as a "storage shed," not as a residential structure. Violation charges 2 and 3 are supported by the record and shall be sustained, and the appeal denied in such regard.

7. With respect to violation charges 2 and 3 regarding the use of the outbuildings as habitable structures, DDES has made an administrative enforcement decision not to require removal of the structures, but requires only that they return to non-habitable status with removal of unpermitted septic facilities, plumbing (and, obviously, kitchen facilities). DDES indicates that permits are necessary for such restorative work.

8. DDES has not presented a sufficient *prima facie* case proving violation charge 1 of the Notice and Order. The evidence submitted into the record is rather murky regarding the asserted use of the main residential structure as a duplex. DDES "believes" that the main house is being used as a duplex, based on hearsay testimony (with the person DDES testified to as having made the statement that the structure was being used as two occupancies not brought forward as a witness). In addition, internal DDES staff communications contain only comments that the alleged two units within the main structure are separable by locking doors; those hardware features in and of themselves are not compelling as sole evidence of separate dwelling units as the term "dwelling unit" is defined in the zoning code. Of particular critical importance, an individual kitchen facility is required for a structural space to constitute a "dwelling unit." [KCC 21A.06.345] That has not been shown in this case. As noted, DDES has also stated that it is "not going to concentrate" on enforcing the violation charge 1 regarding the main residential structure.

CONCLUSIONS:

1. Violation charges 2 and 3 in the Notice and Order were not addressed at all in the appeal documents, and were only untimely contested at hearing. The disputation is untimely and cannot be considered for possible reversal of the Notice and Order. The compliance schedule, however, shall be adjusted given the information presented at hearing, which supports reasonably extended deadlines for compliance. Accordingly, the Notice and Order shall be sustained with regard to violation charges 2 and 3 and the appeal denied.

2. Violation charge 1 has been less than aggressively pursued by DDES, and as noted has not been supported by a sufficient *prima facie* case proving the violation.

DECISION:

The appeal is SUSTAINED with respect to charge 1 of the Notice and Order, since the allegation that the main residential structure is being used as a duplex is not proven, and the Notice and Order is accordingly reversed with respect to that charge.

The appeal is DENIED with respect to charges 2 and 3, and the Notice and Order sustained, except that the deadlines for compliance shall be revised as stated in the following Order.

ORDER:

1. Return the storage shed structure to the original approved use and configuration (particularly regarding sanitation facilities, plumbing and kitchen facilities) *by no later than* **July 31, 2007**, with human occupancy as a residence to be terminated *by no later than* **June 30, 2007**. Permits may be required for such restoration to original use and configuration. As an alternative, such structure may be the subject of an application for approval as an accessory dwelling unit (with the understanding that apparently under the zoning code, the density requirements of Chapter 21A.12 KCC allow only one accessory dwelling unit on the site; DDES is the agency to make such ruling), in which case a complete application for accessory dwelling unit approval shall be filed *by no later than* **February 28, 2007**. All deadlines for additionally requested information associated with the permit application shall be met and the permit obtained within the required deadlines. **If the permit is denied, the structure shall be restored to its original use as required above by July 31, 2007, or within 90 days of permit denial, whichever is later. Regardless of the permit status, human occupancy as a residence shall still be terminated by no later than June 30, 2007 until and unless the permit application is decided favorably.**

2. The garden shed outbuilding shall be returned to the original approved use or be the subject of approval as an accessory dwelling unit under the same terms and deadlines required for the storage shed structure in condition 1 above.

3. No penalties shall be assessed against J. J. Carsten and/or the property if the deadlines stated within the above conditions are met. If any deadline is not met, DDES may impose penalties against Ms. Carsten and/or the property retroactive to the date of this order.

ORDERED December 29, 2006.

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Peter T. Donahue
King County Hearing Examiner

TRANSMITTED December 29, 2006 via certified mail to the following:

J.J. Carsten
P.O. Box 632
Vashon, WA 98070

TRANSMITTED December 29, 2006, to the following parties and interested persons of record:

Mark & Lynne Archer 37234 - 42nd Ave. S. Auburn WA 98001	J. J. Carsten P.O. Box 632 Vashon WA 98070	Zachary Tuck 37242 - 42nd Ave. S. Auburn WA 98001
Deidre Andrus DDES/LUSD MS OAK-DE-0100	Elizabeth Deraitus DDES/LUSD MS OAK-DE-0100	Jo Horvath DDES/BSD MS OAK-DE-0100
DenoBi Olegba DDES/LUSD MS OAK-DE-0100	Lamar Reed DDES/LUSD MS-OAK-DE-0100	Toya Williams DDES/LUSD MS OAK-DE-0100

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE SEPTEMBER 13, 2006, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0300133.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing was DenoBi Olegba, representing the Department; J. J. Carsten, the Appellant, and Zachary Tuck.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	DDES staff report to the Hearing Examiner
Exhibit No. 2	Copy of the Notice and Order issued May 19, 2006
Exhibit No. 3	Copy of the appeal statement received May 26, 2006
Exhibit No. 4	Copies of codes cited in the Notice and Order
Exhibit No. 5	Photographs (13)
Exhibit No. 6	County diagrams
Exhibit No. 7	Letter from Judy Gentry dated July 10, 2006
Exhibit No. 8	Flyer of property from realtor
Exhibit No. 9	Application for Permit dated June 6, 1974
Exhibit No. 10	Copy of the site plan annotated with an arrow showing the storage shed
Exhibit No. 11	Letter to Kurt Koehler from J. J. Carsten dated January 28, 2003
Exhibit No. 12	Residential rental agreement with Craig Huckins dated June 1, 2006
Exhibit No. 13	Letter to Diane Shelton from Sophia Horan dated June 3, 1987
Exhibit No. 14	Final Application for Permit dated May 26, 1987
Exhibit No. 15	Violation Notice to property owner Henry Heerschap dated May 29, 2003 along with a letter to Henry Heerschap dated March 24, 2003 from DenoBi Olegba
Exhibit No. 16	Letter to Code Enforcement from J. J. Carsten dated June 6, 2003
Exhibit No. 17	Letter from Mark & Lynne Archer dated July 11, 2006
Exhibit No. 18	Permits Plus document
Exhibit No. 19	Replacement permit
Exhibit No. 20	Application for a Permit with annotations that it was sent to Shorelines on May 26, 1987

PTD:ms
E0300133 RPT